



Northern Ireland and Abortion Law Reform (Westminster)

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Briefing Paper
**Northern Ireland
AND Abortion Law
Reform**

Reproductive Health Law
and Policy Advisory Group

September 2018

The Reproductive Health Law and Policy Advisory Group is a joint initiative between academics interested in reproductive health and rights. Its founding members are Dr Fiona Bloomer (Ulster University), Dr Kathryn McNeilly (QUB) and Dr Claire Pierson (University of Liverpool), all of whom have extensive research backgrounds in the area of law and policy pertaining to issues of reproductive health. The Advisory Group has been established to provide expertise and knowledge on policy and legal matters related to reproductive health; to facilitate discussions and knowledge transfer between academics, policy and lawmakers, health professionals and stakeholder groups; and to provide advice on legal and policy reform. reproductivehealthlawpolicy.wordpress.com

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Introduction

The purpose of this paper is to provide an overview of Northern Ireland and abortion law reform. The briefing is particularly relevant to the current UK-wide decriminalisation debate, providing an analysis of the Northern Ireland context.

Section 1:

In this section we provide an overview of the **political context**, addressing issues such as the processes of decision-making and the development of legislation.

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Section 2:

In this section we review **current law and human rights** in the context of national and international standards; specifically, we highlight how current law contravenes human rights standards.

Page 06-07

Section 3:

Our focus shifts to those directly impacted; women seeking abortions. We consider **monitoring data** relating to those who travel to England and identify **public opinion and health professional opinion** on legal reform. Finally, in this section we consider the **impact of the fear of criminalisation** on those self-aborting at home.

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A very worried young woman called to ask all about the abortion pills. She had a lot of questions; ‘How do you take them? Are they safe? Will it show on my medical records? Can they trace the pills to me? What is the name of the medication? What are the side effects? Where’s the best site to get them?’ I told her as much as I could but made sure I told her about the funding and travel help from the UK. She was adamant it wasn’t possible. It was exam time, turned out she was a medical student and there was no way she could miss the exams, what possible reason could she give? She was already having to hide her morning sickness in classes. She wondered aloud if she were ever to be caught would it mean she was struck off from her potential career.”

Section 1: Political Context

The Northern Ireland Assembly

The Belfast / Good Friday Agreement, signed in 1998, established a liberal power-sharing (consociational) form of governance in Northern Ireland, designed in particular for countries emerging from, or at risk of, conflict. The main features which impact on decision-making and the development of legislation are:

- **Grand coalition government** in which *major* segments are represented. Proportional representation is ensured through the electoral system. Power is shared at the executive level between unionist and nationalist parties. One cannot be in power without the other. The **d’Hondt system** determines the proportion of unionist and nationalist Ministers appointed to the Executive, based on the number of seats a party wins in the election.
- A **minority veto** system removes the threat of domination for either group. In the case of Northern Ireland this takes the form of the **‘Petition of Concern’** whereby legislation can be blocked if it poses a threat to one of the represented communities. 30 Members of the Legislative Assembly (MLA’s) can request that any decision be taken on a cross-community basis. This means that a decision requires **‘Parallel Consent’** – a concurrent majority of nationalists and unionists and an overall Assembly majority – or the support of a ‘weighted majority’, comprising 40% of nationalist MLA’s, 40% of unionist MLA’s, and 60% of the Assembly.

The efficacy of power-sharing has been criticised (both in Northern Ireland and internationally) for a number of reasons including:

- The ability for the petition of concern to block legislation on issues which are not necessarily related to national / religious identity, for example, abortion and same sex marriage.
- The continual focus on national identity makes it more difficult to develop on policy and legislation on issues which are not integral to national identity or culture.¹
- Policy development in Northern Ireland has been described as a ‘lowest common denominator’ approach of conservative social values and social policies.²

Current Context

Since the Northern Ireland Assembly collapsed in January 2017 there is no mechanism to make legislation at the Northern Ireland Assembly level.

The last vote on abortion law was in February 2016, when two separate amendments to the Justice Bill were put forward. The first was to allow for abortion in cases of fatal foetal anomaly (proposed by the then Justice Minister David Ford of the Alliance Party), and this was defeated by 59 votes to 40. The second, (proposed by Anna Lo of the Alliance party) was to allow for abortion in cases where pregnancy was a result of rape or incest, and this was defeated by 64 votes to 30.

The Democratic Unionist Party (DUP) Health Minister Simon Hamilton set up a working group in February 2016 to examine the issues relating to abortion in cases of fatal foetal anomaly. The findings of the group were not released until April 2018 and recommended that abortion be legal where the foetus is unlikely to reach full gestation or die during or shortly after birth.³

Political Parties’ Positions on Abortion

Whilst party members may have individual views on abortion, official positions from the six main parties are presented here:

Sinn Féin: In June 2018 the party voted to change their policy on abortion to allow access within ‘a limited gestational period’. This is in line with legislation proposed in the Republic of Ireland following the referendum in May 2018. The party also supports abortion in cases of fatal foetal anomaly and sexual crime.⁴

Democratic Unionist Party: the DUP oppose any change to Northern Ireland’s abortion law.⁵

Social Democratic and Labour Party: the SDLP consider themselves a ‘pro-life party’ but since May 2018 have stated that it will allow members vote with their conscience even if that goes against party policy.⁶

Ulster Unionist Party: the UUP consider abortion to be a matter of conscience for elected representatives.⁷

Alliance Party: the Alliance Party consider abortion to be a matter of conscience for elected representatives, however legislative change has been proposed by two elected representatives.⁸

Green Party: the Green Party support full decriminalisation of abortion in Northern Ireland.⁹

“

We had a few calls, secretly, from someone who had to hang up and call back a number of times as she was so afraid. It turned out her ex had destroyed all of her documents, she was in the process of leaving him because he was so abusive but she was pregnant. She had nothing to say who she was, she was far away from him which meant being far away from her support network and had no-one to be with her, no-one to look after her young children for days. There was just no way for her to travel. We reassured her about the safety of the pills but told her she had to not tell anyone at hospital if she needed to go. We had to reassure her that though it was illegal very few people had been arrested. We were asking her to add more secrets and trauma to the awful experience she was going through. She was frightened if he ever found out what she was going to do that she would lose her children to her violent ex-partner.”

Section 2: Human Rights

Current Law in Northern Ireland and Human Rights

Abortion in Northern Ireland is currently a criminal offence under sections 58 and 59 of the Offences Against the Person Act 1861. The only exception to this is where abortion is carried out in good faith to preserve the life of the woman or prevent long-term serious effect to her mental or physical health.¹⁰

This law **predates the development of human rights norms**. These norms have evolved to recognise restrictive and criminal frameworks for abortion provision as engaging important fundamental human rights.¹¹ The section below overviews relevant human rights issues nationally, regionally, and internationally.

National Human Rights Provision

In the UK human rights are protected by the Human Rights Act 1998. This legislation enshrines the provisions of the European Convention on Human Rights (ECHR) in national law and allows them to be drawn upon in UK courts. In 2015 the Northern Ireland Human Rights Commission brought a legal challenge against the prohibition of abortion in Northern Ireland in three circumstances: fatal foetal abnormality; severe foetal malformation; cases of sexual crime. The Commission advanced that this position violated the right to respect for private and family life (Article 8) and the right to be free from torture, cruel, inhumane or degrading treatment (Article 3).

At first instance the Northern Ireland High Court determined that there was a violation of Article 8 in cases of fatal foetal abnormality and sexual crime.¹² This decision was reversed, however, by the Northern Ireland Court of Appeal.¹³ In 2018 the **UK Supreme Court** heard this case. While ultimately determining that the Northern Ireland Human Rights Commission did not have standing to bring the case, the majority found that prohibition of abortion in the case of fatal foetal abnormality and sexual crime was incompatible with Article 8. A minority also found a violation of Article 3.

Delivering their judgment, the Supreme Court Law Lords stated that while remedy could not be awarded due to the legal issue of standing, the Court has made a clear statement that the current law regulation abortion in Northern Ireland is incompatible with human rights provisions enshrined in domestic law.¹⁴

The European Convention on Human Rights

The UK is a party to the ECHR, and bound by the judgments of its adjudicative body, the European Court of Human Rights. From the early 2000s this Court has heard a number of cases related to restrictive legal frameworks for abortion. This provides a corpus of jurisprudence determining when human rights under the ECHR are engaged and may be violated. In cases where abortion is lawful but access is prohibited in practice – for example, by health professionals, structures or unclear information – the Court has found a violation of Article 8¹⁵ and Article 3.¹⁶ These issues may be engaged in Northern Ireland due to a lack of appropriate and timely pathways and information on lawful abortion, even where funding is available for services in Great Britain.¹⁷

International Human Rights Law

The UK is a signatory to all major international human rights treaties. In the past twenty years international human rights law has evolved to recognise the denial of safe abortion services as a human rights violation. The 1994 International Conference on Population Development and the 1995 Beijing Declaration and Platform for Action both outlined the importance of access to safe, legal abortion as a human rights concern.

The United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee Against Torture and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) have stressed that states must guarantee accessible legal abortion services.¹⁸ In particular, they have noted that criminal frameworks and punishments for abortion are not human rights compliant.¹⁹

In 2016 the **CEDAW Committee** carried out an inquiry into Northern Ireland's abortion law.²⁰ In 2018 it published its report which determined that the current law in Northern Ireland results in grave and systematic violation of human rights under CEDAW. The Committee made recommendations in two areas to remedy the violation:

1. Change of Legal Framework: Repeal sections 58 and 59 of the Offences Against the Person Act 1861 and create new legislation with expanded grounds for access to abortion. Interim cease on application of criminal law should be put in place.
2. Improvement to local sexual and reproductive health rights and services: This should include access to contraception and high quality abortion/post-abortion care; rights-based counselling and information on sexual and reproductive health and services; reform of sex education; awareness-raising campaigns on reproductive and sexual health; combatting of gender stereotypes; protection of clinic staff and service users from harassment by anti-abortion protestors.

Human Rights Summary

In 2018 the UK Supreme Court and the United Nations CEDAW Committee outlined that the current framework regulating abortion in Northern Ireland is in violation of national and international human rights commitments. These developments reflect a wider international movement conceiving access to abortion as a human rights issue.²¹ Human rights are not only a transformative language which transcends the limitations of polarised debate on abortion,²² but legal imperatives which the UK has commitments to protect, respect and fulfil.

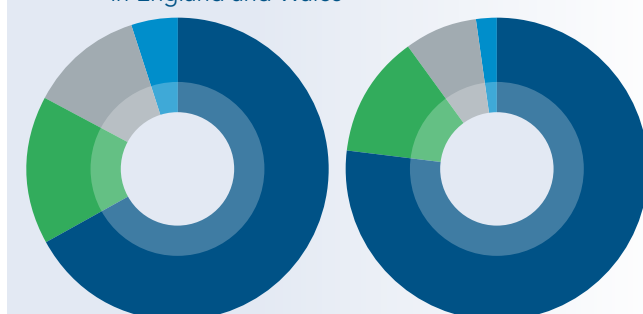
Section 3: Monitoring Data, Public and Health Professional Views, case studies Monitoring Data

Access to abortion in Northern Ireland is highly restricted, resulting in less than 20 legal abortions being carried out in the last reported year. Others travel outside of Northern Ireland or self-abort at home.²³

An analysis of data provided by the Department of Health²⁴ provides insight into the **demographic profile** of Northern Ireland residents who access abortions in England and Wales. In broad terms their profile is similar to residents of England and Wales:

- In terms of marital status over 60% have a partner/ are married / are in a civil partnership
- In terms of age 12% are teenagers, 48% are aged 20-29 and the remainder are aged 30+
- 50% of those who obtain abortions are already mothers

Table 1 Gestation time of those who obtain abortions in England and Wales²⁵

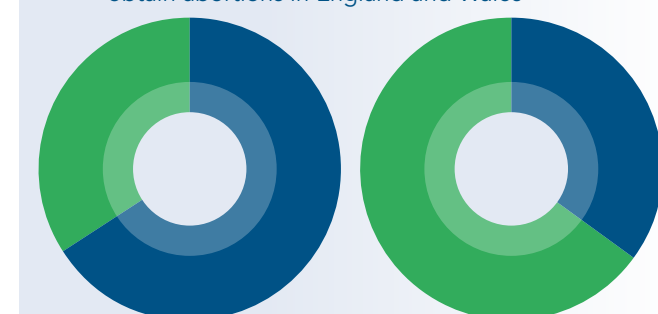


In terms of the type of procedure, the data indicate that those from Northern Ireland are much more likely to choose a surgical method compared to residents of England and Wales, as detailed in Table 2 (66%; 35%). This is likely due to a preference to complete the abortion at the clinic, using the surgical method, as opposed to the medical method which entails ingesting medication, and requires some hours to complete the abortion, during which time they may be travelling back to Northern Ireland. Again, it is noteworthy that surgery is more invasive and carries higher risks of complications.

Whilst the category of religion/ community background is not collected, interpreting the preferred ethnic identity of Northern Ireland residents - white British (39%) and white Irish (48%) - suggests members of both communities are travelling to access abortion in in England and Wales.

Key differences can be observed between Northern Ireland residents and those resident in England and Wales in terms of **gestation of the pregnancy and method of termination**. For instance, women in Northern Ireland are less likely to obtain an early abortion compared to residents of England and Wales as detailed in Table 1 (67%; 77%). This is likely to be due to delays in accessing information on abortion services, the need to make travel plans, arrange time off work and organise childcare. It is noteworthy that later gestation times require more invasive procedures and carry higher risks of complications.

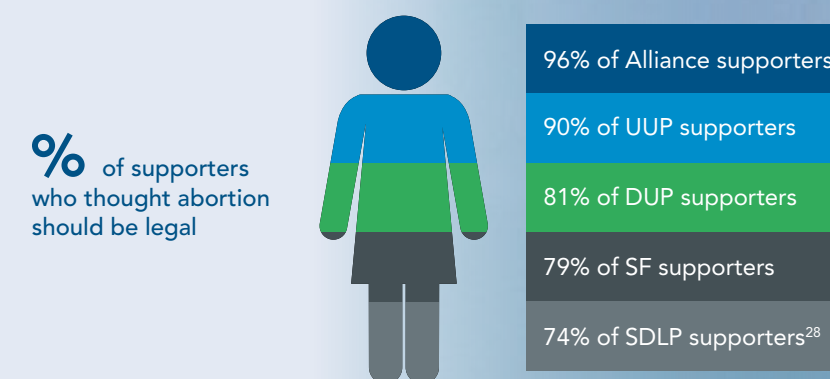
Table 2 Abortion procedure accessed by those who obtain abortions in England and Wales²⁶



A ground-breaking study conducted in 2017, entitled Abortion As A Workplace Issue,²⁷ provides further insight into the barriers faced by those needing abortion in Northern Ireland. This included being unable to access sick leave, returning to work whilst still recovering from the abortion, isolation and stigma. The study, which comprises a survey of over 2,000 trade union members in Northern Ireland, also provides clear evidence of support for legal reform- 84% of respondents stated a woman should not be criminalised for having an abortion.

Public Opinion

Over the last two decades repeated public opinion polls have provided clear evidence of support for legal reform, albeit in restricted forms. More recent research, the Northern Ireland Life and Times Survey (equivalent to the British Social Attitudes Survey), determined that the Northern Ireland public are broadly in favour of reform. The survey also identified that across voters for all the main political parties there was support for reform. For instance, in the circumstances that a pregnant woman was likely to die as a result of the pregnancy, below represents the percentage of supporters who thought abortion should be legal.



Health Professional Opinion

The authors of this paper have engaged with health professional organisations such as the Royal College of Midwives (RCM), the Royal College of Nurses (RCN) and the Royal College of Obstetricians and Gynaecologists (RCOG) since 2016 in a series of roundtables. These sessions have evidenced that access to abortion is regarded as being deeply problematic. Concerns have been raised as to the implementation of guidelines, and that there is a lack of awareness over policy changes elsewhere in the UK.²⁹

Senior health professionals have also publicly articulated concerns related to those self-aborting at home. Breedagh Hughes (recently retired director of the RCM) stated that she is extremely concerned that the threat of criminalisation will lead to the untimely death of a woman, due to the fear of seeking medical treatment if complications arise.³⁰

Impact of the fear of criminalisation

Consultation sessions with the activist organisation, Alliance for Choice³¹, identified a series of case studies which provide insight into the stresses experienced by those who self-abort at home. In each case the woman sought information on accessing abortion medication, discussed the fear of criminalisation and, as outlined below, detailed the circumstances which prevented them accessing abortion elsewhere:

“We had a few calls, secretly, from someone who had to hang up and call back a number of times as she was so afraid. It turned out her ex had destroyed all of her documents, she was in the process of leaving him because he was so abusive but she was pregnant. She had nothing to say who she was, she was far away from him which meant being far away from her support network and had no-one to be with her, no-one to look after her young children for days. There was just no way for her to travel. We reassured her about the safety of the pills but told her she had to not tell anyone at hospital if she needed to go. We had to reassure her that though it was illegal very few people had been arrested. We were asking her to add more secrets and trauma to the awful experience she was going through. She was frightened if he ever found out what she was going to do that she would lose her children to her violent ex-partner.”

“A very worried young woman called to ask all about the abortion pills. She had a lot of questions; ‘How do you take them? Are they safe? Will it show on my medical records? Can they trace the pills to me? What is the name of the medication? What are the side effects? Where’s the best site to get them?’ I told her as much as I could but made sure I told her about the funding and travel help from the UK. She was adamant it wasn’t possible. It was exam time, turned out she was a medical student and there was no way she could miss the exams, what possible reason could she give? She was already having to hide her morning sickness in classes. She wondered aloud if she were ever to be caught would it mean she was struck off from her potential career.”

“A text message comes through, ‘Hi, you don’t know me but someone told me you can help?’ We communicated by text for the next day about how to access the pills safely and how to limit the chances of being arrested. There was no way she could travel as her boss wouldn’t let her take time off at this short notice and it took her a year and a half to get out of unemployment. A week or so later she texted again, ‘Do you mind going through with me again what’s going to happen when I take them?’ We exchanged texts for 45 minutes and I asked her if she had anyone she could be with whilst she took them. ‘My sister’s in the next room but she won’t talk to me because I told her what I’m doing.’ I stayed with her on the phone for the rest of the evening making sure she was comfortable and knew what to expect and wasn’t in any danger.”

Conclusion

The evidence reviewed in this briefing sets out the issues impacting on how access to abortion is considered in the political context, identifying that whilst there is a clear need for reform, that this would be supported by the public and health professionals, and that the peculiarity of legislative structures mean that reform to date has been unachievable. It is also evident that the current framework regulating abortion in Northern Ireland is in violation of national and international human rights commitments. As a result of this, women from Northern Ireland are under threat of criminality, or travelling to access abortion at later times and using more invasive options than their counterparts elsewhere in the UK.

Should intervention from Westminster occur, leading to decriminalisation, this would likely result in a mixed reaction from political parties, dependant on their position as outlined in this paper. Notably a similar intervention occurred in 2004 when the Civil Partnership Act was introduced under a period of direct rule. This Act remains in place and has not been subject to any challenge by any political party. It is again worth noting that public opinion is in favour of reform, with less than 10% identifying themselves as being opposed to any access to abortion.

The impact of decriminalisation would result in women being able to access abortion locally, at earlier times, using less invasive procedures, and without fear of criminalisation.

Endnotes

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² McLaughlin, E. (2005) ‘Governance and social policy in Northern Ireland (1999–2002): the devolution years and postscript’, in M. Powell, L. Bauld and J. Clarke (eds.), Social Policy Review 17, Analysis and Debate in Social Policy 2005, Bristol: The Policy Press, pp. 107–24.

³ Department of Justice / Department of Health NI (2016) Report Of The Working Group On Fatal Fetal Abnormality Healthcare And The Law On Termination Of Pregnancy For Fatal Fetal Abnormality. Online at: www.health-ni.gov.uk/sites/default/files/publications/health/report-fatal-fetal-abnormality-April-2018.pdf

⁴ Sinn Fein Party Manifesto 2017 www.sinnfein.ie/files/2017/MANIFESTO_ENGLISH.pdf

⁵ DUP Party Manifesto 2017 www.mydup.com/images/uploads/publications/DUP_Manifesto_2017_v2_SINGLES.pdf

⁶ SDLP Party Manifesto 2016 www.sdlp.ie/site/assets/files/43032/sdlp_manifesto_web-1.pdf

⁷ UUP Manifesto 2016 uup.org/assets/policies/assembly%20manifesto.pdf

⁸ Alliance Party Manifesto 2017 allianceparty.org/document/manifesto/2017-assembly-manifesto#document

⁹ Green Party Manifesto 2017 www.greenparty.org.uk/wp-content/uploads/2017/02/GreenParty_Manifesto_2017_Web.pdf

¹⁰ R v Bourne [1939] 1 KB 687. Commentary from lawyers, judges and, in our own research, from health professionals indicates that the law here lacks clarity and it is difficult to determine when a case will fall within this exception, and that health professionals are reluctant to take the risk. See Fiona Bloomer, Kathryn McNeilly and Claire Pierson, Moving Forward From Judicial Review on Abortion in Situations of Fatal Foetal Abnormality and Sexual Crime: The Experience of Health Professionals (Belfast, 2016) p 8.

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¹² The Northern Ireland Human Rights Commission’s Application [2015] NIQB 96.

¹³ Attorney General for Northern Ireland and the Department of Justice v The Northern Ireland Human Rights Commission [2017] NICA 42.

¹⁴ See further McNeilly, K., Bloomer, F. and Pierson, C. (2018), ‘The Supreme Court’s Decision on Northern Ireland’s Abortion Law – What Now?’ LSE Politics and Policy, available at: blogs.lse.ac.uk/politicsandpolicy/supreme-court-on-ni-abortion-law

¹⁵ Tysiac v. Poland (Application no. 5410/03) (2007); A., B. and C. v. Ireland (Application no. 25579/05) (2010); R. R. v Poland (Application no. 27617/04) (2011); P. and S. v Poland (Application no. 57375/08) (2012).

¹⁶ R. v Poland (Application no. 27617/04) (2011); P. and S. v Poland (Application no. 57375/08) (2012).

¹⁷ McNeilly, K., (2017) ‘Beyond Article 8: The European Convention on Human Rights and Abortion in Cases of Fatal Foetal Abnormality and Sexual Crime’, Stormont Knowledge Exchange Seminar Series, available at niassembly.tv/beyond-article-8

¹⁸ For example, Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 22. UN Doc. E/C.12/GC/22. The Right to Sexual and Reproductive Health. 2016CESCR, General Comment No. 14. UN Doc. E/C.12/2000/4. The Right to the Highest Attainable Standard of Health. 2000 para. 12. Human Rights Committee (HRC), Communication No. 1153/2003. UN Doc. CCPR/C/85/D/1153/2003. K.L. v. Peru. 2005 para. 7. HRC, Communication No. 1608/2007. UN Doc. CCPR/C/101/D/1608. L.M.R. v. Argentina. 2011 para. 10. Committee on the Elimination of Discrimination against Women (CEDAW Committee), Communication No. 22/2009. UN Doc. CEDAW/C/50/D/22/2009. L.C. v. Peru. 2011.

¹⁹ For example, CESCR, General Comment No. 14. UN Doc. E/C.12/2000/4. The Right to the Highest Attainable Standard of Health. 2016 para. 41. CEDAW Committee, Concluding Observations on Kuwait. UN Doc. CEDAW/C/KWT/CO/3-4. 2011 para. 43(b) Concluding Observations on Hungary. UN Doc. CEDAW/C/HUN/CO/7-8. 2013 paras. 30-31.

²⁰ For a background on this investigation see Bloomer, F., McNeilly, K., and Pierson, C. (2018) ‘Briefing Document: Report of the Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women’ Reproductive Health Law and Policy Advisory Group, available at: reproductivehealthlawpolicy.files.wordpress.com/2018/04/cedaw-briefing-rhlpag4.pdf

²¹ See further Rebouché, R. (2016) ‘Abortion Rights as Human Rights’ Social and Legal Studies, 25(6): 765-782.

²² See McNeilly, K., (2015) ‘From the Right to Life to the Right to Livability: Radically Reapproaching “Life” in Human Rights Politics’ Australian Feminist Law Journal (2015) 41(1): 141-159.

²³ Bloomer, F., McNeilly, K. and Pierson, C. (2016) Moving forward from judicial review on abortion in situations of fatal foetal abnormality and sexual crime: The experience of health professionals, Briefing paper, Reproductive Health Law and Policy Advisory Group, available at: reproductivehealthlawpolicy.files.wordpress.com/2017/03/healthcareprofessionalsroundtablereport-090916.pdf

²⁴ Department of Health (England) (2018) Abortion statistics, England and Wales: 2017 data tables, available at: www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2017

²⁵ Data extracted from source 24.

²⁶ Data extracted from source 24.

²⁷ Bloomer, F., Devlin-Trew, J., Pierson, C., MacNamara, N. and Mackle, D., (2017) Abortion as a workplace issue: Trade union survey – North and South of Ireland. Dublin: UNITE the Union, Unison, Mandate Trade Union, the CWU Ireland, the GMB, Alliance for Choice, Trade Union Campaign to Repeal the 8th.

²⁸ Gray, AM; Horgan, G., Devine, P (2018) Do social attitudes to abortion suggest political parties in Northern Ireland are out of step with their supporters?, ARK Feature, available at: www.ark.ac.uk/pdfs/Features/feature7.pdf

²⁹ See note 23.

³⁰ McDowell, L (2018) ‘I have nightmares about women here buying abortion pills over the internet... one of these days someone is going to die’ interview with Breedagh Hughes, Belfast Telegraph, 30 July 2018, available at: www.belfasttelegraph.co.uk/life/features/i-have-nightmares-about-women-here-buying-abortion-pills-over-the-internet-one-of-these-days-someone-is-going-to-die-37165354.html

³¹ Alliance for Choice is an organisation that campaigns to end the criminalisation of abortion and gain access to reproductive justice in Northern Ireland www.alliance4choice.com

